Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1979.

No. 79-842

RIVERSIDE MEMORIAL MAUSOLEUM, INC.
T/A DELAWARE VALLEY MEMORIAL CENTER;
L. BLUMBERG'S SON, INC.
and HELEN ROTHCHILD BLUMBERG,
Petitioner,

v.

SONNENBLICK-GOLDMAN CORPORATION,
Respondent.

RESPONDENT'S MEMORANDUM OPPOSING CERTIORARI AND OPPOSING PETITIONER'S PETITION TO CONSIDER PETITION FOR CERTIORARI AS TIMELY FILED.

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1. Respondent represents to the Court as follows:

a. The above-entitled cause, a civil case, was submitted on August 6, 1979, and judgment entered on August 7, 1979, by the United

States Court of Appeals for the Third Circuit.

b. A Petition for Rehearing was submitted by Petitioner herein on August 17, 1979, and on August 31, 1979 this Petition for Rehearing was denied by the United States Court of Appeals for the Third Circuit.

c. The Petition for a Writ of Certiorari was filed on November 30, 1979, more than ninety days since the denial of the Petition for Rehearing by the Court of Appeals. (U.S.C., Title 28, Sec. 2101(c) and Rule 22 of this Court.)

d. No application for an extension of time within which to petition for a Writ of Certiorari was submitted before the expiration of the ninety days, and the period for

applying for a Writ of Certiorari has not been extended by a Justice of this Court. (U.S.C., Title 28, Sec. 2101(c) and Rules 22 and 34(2) of this Court.)

e. The cases cited by Petitioner in its Petition to Consider Petition for Certiorari as Timely Filed are inapposite. Both of those cases were criminal cases, in which the ninety day time limitation was imposed solely by Rule 22(1) of this Court, and not by jurisdictional statute. See, Heflin v. United States, 358 U.S. 415, 418 n.7 (1959). Durham v. United States, 401 U.S. 481 (1971), and Taglianetti v. United States, 394 U.S. 316, 317 n.1 (1969), cited by Petitioner, stand for the proposition that timeliness under this Court's rules presents no jur-

isdictional question. The above-entitled cause is a civil case, as to which the time limitations are imposed by U.S.C., Title 28, Sec. 2101(c), and implemented by this Court's rules.

f. THEREFORE, it appears that Petitioner' application for a Writ of Certiorari is out of time and "must . . . be denied for want of jurisdiction," Department of Banking v. Pink, 317 U.S. 264, 268 (1942).[1]

1. No exceptions to or waivers of the time requirement imposed by U.S.C., Title 28, Sec. 2101(c) are recognized, no matter how extenuating the circumstances. See, e.g., Deal v. Cincinnati Board of Education, 402 U.S. 962 (1971) (airline lost all the papers); Teague v. Commissioner of Customs, 394 U.S. 977 (1968) (unforeeable snowstorm created postal delay). In addition, no such extenuating circumstances are present in this case.

2. Respondent further represents to the Court as follows:

a. The above-entitled cause clearly does not warrant review by this Court, as is shown by the opinions below (reprinted as Appendices B and C to Petition for Writ of Certiorari).

b. This case concerns the imposition of sanctions pursuant to F.R.C.P. 37, not for a late filing of Answers to Interrogatories as alleged by Petitioner, but rather for a total failure to file such Answers, preceded by other instances of disregard of court orders and time requirements. Petitioner's Answers to Respondent's Interrogatories were due on August 21, 1978. No answers were filed. On August 24, 1978, Respondent served Petitioner with a Motion for Sanc-

tions (specifying the sanction eventually imposed), with a notice that the motion would be filed in the District Court on August 31, 1978.[2] Petitioner filed a response to the Motion for Sanctions. On September 1, 1978, no answers to interrogatories having been filed by Petitioner, the District Court granted the Motion for Sanctions. Thereafter, Petitioner attempted to file answers to the interrogatories (which answers were found by Judge Lord to be totally inadequate). See, Opinion of Judge Lord, Appendix C to Petition for Certiorari, at pp. A6-A7.

2. Local Rule of Civil Procedure 36 provides for service of a copy of the motion on respondent at least five days before filing and for the respondent to reply on the date set for filing.

c. Petitioner's entire course of conduct in this case is evidence of Petitioner's bad faith. See Opinion of Judge Lord, Appendix C to Petition for Certiorari, at A5-A13, and additional items appearing of record which are catalogued in Brief for Appellee in the Court of Appeals (Respondent herein), and citations to the Record therein.

d. Petitioner had ample notice of the importance of compliance with court orders and time requirements in this case. In addition to the fact that the District Court previously had dismissed this action for want of prosecution, the District Court's order that discovery be completed by September 5, 1978 was quite explicit, stating in part that:

> "(1) All discovery and pre-trial proceedings shall be completed before September 5, 1978, and the case shall be subject to call for trial at any time thereafter.
> (2) Counsel shall take whatever steps are necessary to insure compliance with the time limitation set in paragraph (1) hereof.
> (3) If opposing counsel's lack of response or lack of compliance with discovery makes it appear likely that the deadline may pass without completion of discovery, counsel is expected to invoke the procedures established by the Federal Rules of Civil Procedure and the Local Rules of this court to compel compliance.
> (4) Failure of counsel to utilize such procedures to insure compliance of the discovery deadline shall not be a ground for enlargement of discovery time or postponement of trial."

Order of Judge Lord (July 14, 1978), reprinted at pp. 51a-52a of Appendix to the Briefs of Appellant in the Court of Appeals (Petitioner herein).

e. Petitioner states that a one and one-half month period was inadequate for discovery in this case, thereby implying that no more time had been available. However, Petitioner could have engaged in discovery during the eight month period between the filing of the Complaint on April 14, 1975 and the first dismissal of this action on December 10, 1975, but failed to do so.

d. THEREFORE, the Petition for a Writ of Certiorari, and the Petition to Consider Petition for Certiorari as Timely Filed, should be denied.

Respectfully submitted,

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